No. 89-260

In The

Supreme Court of the United States

October Term, 1989

THE STATE OF IDAHO,

Petitioner,

vs.

LAURA LEE WRIGHT,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Idaho

REPLY BRIEF FOR PETITIONER

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I.

PETITIONER HAS CORRECTLY STATED THE HOLDING OF THE IDAHO SUPREME COURT

Respondent asserts that the Court should dismiss the Petition because "[t]he Court granted review on an issue raised by the Idaho Attorney General, which issue is not presented by a fair reading of the state court's opinion." (Resp. Br. draft pp.36-37.)[1] In particular, respondent alleges:

> Petitioner has misrepresented the holding of the Idaho Supreme Court. The court below did not hold that any use of leading questions prevents use of the statements thereby obtained. The court did not say that statements cannot be admitted unless they were elicited on videotape, nor did the court say that the questioner can possess no knowledge of the allegations. The court below found the statements to be untrustworthy because of the combination of these factors and the record made of this particular child's ability to communicate.

Id. at 16-17.

Justice Huntley, the author of the opinion of the court below, would be surprised to learn that his requirements are to be taken in combination, not separately. Concurring in the result only in the companion case of *State v.*

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[1] Respondent's amicus, the National Association of Criminal Defense Lawyers (NACDL), voices the same argument: "Because the issue presented to this Court misstates the ruling below, *certiorari* was improvidently granted, and this matter should be immediately returned to the state court." NACDL Br. p.4.

Giles, 115 Idaho 984, 995, 772 P.2d 191, 202 (1989), Justice Huntley had stated:

> I would hold that all declarations of very young children in response to a professional's interrogation are *per se* inadmissible unless they are spontaneous, excited utterances or 1) such declarations are elicited by a competent, trained professional, specifically trained in interviewing child victims and aware of the dangers of suggestibility disclosed in psychological research; *and* 2) the entire interview is videotaped so the possibility of verbal and non-verbal suggestion can be evaluated later; *and* 3) the evidence establishes that the child's memory was not confabulated by previous improper interviews.

(Emphasis in original.)

Justice Huntley would have held, "At minimum, the sessions should be video-taped and the examiner should not be permitted to use leading, suggestive and closed-ended questions." *Id.*, 115 Idaho at 988, 772 P.2d at 195. The alert reader will note that Justice Huntley's dissent in *Giles* became, almost verbatim, the Idaho Supreme Court's majority opinion in *Wright*.

Chief Justice Bakes, author of the majority opinion in *Giles*, was uniquely situated to understand the meaning of the Idaho Supreme Court's opinion in *Wright*, to which he dissented:

> As I deduce from the opinion's analysis, from now on all hearsay statements by very young children are inadmissible unless they are either (1) uttered spontaneously and excitedly, or (2) made in response to "open-ended" questions from a specially trained professional during a

> videotaped interview and the evidence establishes that the child's memory was not "confabulated" by previous improper interviews.

State v. Wright, 116 Idaho 382, 389, 775 P.2d 1224, 1231 (1989).

Nor is there the slightest doubt as to the meaning of *Wright* in Idaho's trial courts, where defense counsel have already succeeded in three instances in excluding the out-of-court statements of child sex abuse victims to an aunt, a pediatrician and a mental health therapist on the ground that the hearsay statements were not videotaped. *See* Reply Brief, Appendix A. In each instance, inadmissibility of the only eyewitness testimony available has meant that the prosecution was unable to proceed.

Finally, respondent's amicus, the American Civil Liberties Union (ACLU), applauds the Idaho Supreme Court's finding "that the truth-seeking function of a trial is impaired by the use against defendant of statements elicited by the prosecution from a young child at an unrecorded interview." ACLU Br. p.26. Indeed, the ACLU urges upon this Court adoption of the same prophylactic rule adopted by the Idaho Supreme Court. As heading II states: "THE CONFRONTATION CLAUSE SHOULD, AT A MINIMUM, REQUIRE THE EXCLUSION OF A CHILD'S STATEMENT ELICITED BY PROSECUTORIAL AUTHORITIES AT AN UNRECORDED INTERVIEW." *Id.* at 20.

Thus, contrary to respondent's objection,[2] the opinion of the Idaho Supreme Court below squarely presents

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[2] Respondent is not consistent in objecting to this reading of the court's opinion below. On the one hand, respondent

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to this Court the question whether the trial judge may look to the totality of circumstances in determining the admissibility of out-of-court statements of unavailable child sexual abuse victims, or whether such statements are *per se* inadmissible if they violate any of several threshold mechanical requirements – the most crippling of which is a requirement that the statement must be videotaped.

II.

THE OUT-OF-COURT STATEMENTS OF A CHILD ARE NOT *PER SE* INADMISSIBLE SIMPLY BECAUSE THE CHILD IS FOUND INCOMPETENT TO TESTIFY AT TRIAL BECAUSE OF INFANCY

Respondent argues that a judicial finding that a declarant is incompetent to testify at trial leads logically to the conclusion that the same declarant's out-of-court statements should generally be excluded. Resp. Br. draft p.20. Amicus NACDL concurs, citing approvingly Wigmore's assertion in the context of dying declarations that "[i]f the declarant would have been disqualified to take the stand by reason of infancy, . . . his extrajudicial

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argues that "[t]he opinion below cannot fairly be read to stand for the proposition that absence of a videotape, by itself, or any use of leading questions, without more, would necessarily compel a finding of inadmissibility." Resp. Br. draft p.26-27. On the other hand, respondent argues that "[t]he decision below advances the purposes of confrontation by encouraging videotaping of all interviews of possible victims of child sexual abuse, and by *demanding* a videotape record of the elicitation of questionable accusations by suspect means." Resp. Br. draft p.33 (emphasis added).

declarations must also be inadmissible." NACDL Br. p.20, quoting 5 Wigmore, *Evidence*, 1445 (Chadbourn Rev. 1979). Both respondent and amicus NACDL would make an exception for "firmly rooted" exceptions, mainly excited utterances.

Respondent argues that because the trial judge, under Rule 601(a) of the Rules of Evidence, found the younger daughter incompetent to testify at trial, he "necessarily found her to be incapable of receiving just impressions of facts or of relating them truthfully." Resp. Br. draft p.19. Thus, the youngster's "assertions were too unreliable for her to testify" and were certainly "no *more* reliable because they were related through the paraphrase of the pediatrician . . . ." *Id.*

The argument, of course, blurs the two separate components of testimonial incompetency found in Rule 601(a) and assumes that anyone found incompetent must be both (1) "incapable of receiving just impressions of the facts" *and* (2) incapable "of relating them truly."[3] The trial judge in this case found only that the child was "not capable of communicating to the jury." J.A. 38. He did not find that she was incapable of receiving just impressions of the molestation she had suffered, or of recalling it, or of talking about it in the relaxed setting of a pediatrician's examination and interview.

On the contrary, by ruling the statements were admissible as containing sufficient indicia of reliability the trial court implicitly found the child was in fact capable

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[3] Amicus NACDL pushes the argument still further by repeatedly referring to the child as "mentally incompetent."

of receiving just impressions of the facts. The "incompetence" of the younger daughter went only to her ability to testify before a jury. J.A. 39, 115.

It should also be noted that the Wigmore treatise itself does not support the *per se* rule that unreliability of hearsay necessarily follows incompetence to testify. In the section of the treatise dealing with spontaneous exclamations, Wigmore states:

> Does the disqualification of *infancy* exclude declarations otherwise admissible? It would seem not; because the principle of the present exception obviates the usual sources of untrustworthiness in children's testimony; because, furthermore, the orthodox rules for children's testimony are not in themselves meritorious; and, finally, because the oath test, which usually underlies the objection to children's testimony, is wholly inapplicable to them.

6 Wigmore, *Evidence*, § 1751 (Chadbourn rev. 1976) (emphasis in original, citations and footnote omitted).[4]

For further examples of the application of this principle, *see United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) (three-year-old's statements admissible under a spontaneous declaration exception though he "could not have been subjected to cross-examination even if he had been called as a witness by reason of his tender years"); *Jones v. United States*, 231 F.2d 244 (D.C. Cir. 1956) (five-year-old

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[4] Indeed, Wigmore argued that efforts to measure a *priori* the degrees of trustworthiness in children's statements were "futile and unprofitable." He recommended the abolishment of all grounds for testimonial incapacity as applied to children. 2 Wigmore, *Evidence*, § 509 (Chadbourn rev. 1979).

incompetent to testify as witness but statements to her mother were admissible as spontaneous declarations); *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988) (out-of-court statements by four-year-old sexual abuse plaintiff to her psychologist admissible under medical diagnosis or treatment exception to hearsay rule, though plaintiff was incompetent to testify as a witness, where statements were pertinent to plaintiff's treatment and were reasonably relied upon by a psychiatrist in treating plaintiff).

In the present case, the trial court did not have a "firmly rooted" hearsay exception to rely upon. Nevertheless, there were indicia of reliability of the younger daughter's statements. These included: (1) physical evidence corroborating sexual abuse; (2) a lack of motive to fabricate; (3) the nature of the statements themselves; (4) the fact that the younger daughter was in the sole custody of Laura Lee Wright and Robert Giles, her biological parents, at the time the injuries occurred; (5) the older daughter's testimony that it was Wright and Giles who perpetrated the sexual abuse on the younger daughter; and (6) the perpetrators were well known to the victim. J.A. 115. The court concluded that the younger daughter's statements to Dr. Jambura were admissible under Rule 803(24) because their circumstantial guarantees of trustworthiness were equivalent to statements permitted under some of the firmly rooted hearsay exceptions. J.A. 119. This ruling is in keeping with a large body of law throughout the United States, and is a logical extension of the policies espoused by Wigmore and such cases as *Nick*, *Jones*, and *Morgan*.

In *People v. District Court of El Paso County*, 776 P.2d 1083 (Colo. 1989), the trial court found a four-year-old

child was not competent to testify as she was unresponsive to questions in open court and could not state what it meant to tell the truth or to lie. The trial court concluded that the child's statements to a pediatrician were therefore unreliable. The Supreme Court of Colorado rejected the trial court's analysis and adopted, instead, the two-pronged test approved by this Court in *Ohio v. Roberts*, 448 U.S. 56 (1980). First, the court must determine whether the proponent of the hearsay either produced the hearsay declarant for cross-examination or demonstrated that the declarant was unavailable. If the declarant is unavailable to testify, the next issue is whether the hearsay bears sufficient indicia of reliability, precluding the need for cross-examination. The court held that the trial court's order finding the victim not competent to testify rendered her "unavailable." The court went on to state:

> By so holding, we promote the rule that a child's out-of-court declaration is not automatically rendered inadmissible merely because the child was found to be not competent at the competency hearing. . . . Rather, the finding that a child is not competent to testify requires the trial court to determine whether the child's hearsay statement is sufficiently reliable to be admitted in spite of the child's unavailability and whether there is corroborative evidence of the act which is the subject of the statement. . . . This rule is a recognition of the fact that children present special problems as witnesses due to their short memories, possible traumatic reaction as victims, and tendency to be intimidated by formal trial settings.

776 P.2d at 1087. In words equally applicable to the present case, the Colorado Supreme Court held:

> A competency hearing determines only whether a child can accurately recollect and narrate at trial the events of abuse, . . . not whether the child was competent at the time the hearsay statement was made or whether the statement was reliable. A child's reliable out-of-court statement that accurately relates an incident of abuse will not be barred merely because the child was so frightened by the competency hearing proceedings that he or she became unresponsive or uncommunicative at the hearing. By interpreting the statute in this manner, we reject the logically flawed assumption that a determination of incompetency at the time of the hearing invariably establishes that the child's statement was not reliable. In our view, this determination is to be made by the trial court when deciding whether the child's statement is supported by sufficient safeguards of reliability.

776 P.2d at 1087-1088 (citations and footnote omitted).

The logical framework set forth in *People v. District Court of El Paso County* has been used by other courts in determining whether out-of-court statements by very young children would be admissible despite their inability to testify. *See State v. Superior Court for the County of Pima*, 719 P.2d 283 (Ariz. App. 1986) (proffered statements must be evaluated in the factual context of the particular case to determine whether reliability is sufficiently indicated); *State v. Robinson*, 753 P.2d 801 (Ariz. 1987) (where principles announced in *Roberts* are fully satisfied, it would be a perversion of the confrontation clause to exclude the evidence); *Perez v. State*, 536 So.2d 206 (Fla. 1988) (requirement that the trial court find that the time,

content, and circumstances of the statement provide sufficient safeguards of reliability and furnish sufficient guarantees of trustworthiness of the hearsay statement, obviating the necessity that the child understand the duty of a witness to tell the truth). *See also State v. Lanam*, 444 N.W.2d 882 (Minn. App. 1989) (rev. granted 1989); *State v. Boston*, 545 N.E.2d 1220 (Ohio 1989); *State v. Bounds*, 694 P.2d 566 (Ore. App. 1985); *State v. Doe*, 719 P.2d 554 (Wash. 1986.[5]

In summary, the premise of respondent and NACDL – that an out-of-court statement of a child found incompetent to testify must be held unreliable – is logically flawed, and not in keeping with the spirit of *Ohio v. Roberts*. It is not applied by enlightened courts, and it

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[5] Counsel for Wright cites *State v. Ryan*, 691 P.2d 197 (Wash. 1984), in support of the *per se* rule of inadmissibility. *Ryan* was described as "admittedly confusing" in *State v. Hunt*, 741 P.2d 566 (Wash. App. 1987), because of the imprecise use of the term "incompetency." The court noted:

> The circumstantial guarantees of trustworthiness generally used to analyze the reliability of hearsay statements presuppose, in most instances, that the hearsay declarant possessed a certain degree of mental capacity throughout the relevant time period. If the requisite mental capacity is lacking, the time, manner, and circumstances of the making of the statement may well be irrelevant to a determination of reliability.

741 P.2d at 569. *Ryan* was clarified by *Doe, supra*, which indicated that the reliability of an unavailable child's statements may be indicated by spontaneity, by recitation of acts generally unknown to children, or by surrounding circumstances.

should not be adopted as an adjunct to the right of confrontation.

III.

A PEDIATRICIAN'S INTERVIEW OF A CHILD SEXUAL ABUSE VICTIM IS NOT ANALOGOUS TO EYEWITNESS IDENTIFICATION AT A PRETRIAL LINEUP OR TO HYPNOTICALLY REFRESHED TESTIMONY

A. The Out-of-court Statements of a Child Sexual Abuse Victim Are Not Analogous to Custodial Pretrial Identifications.

Amicus curiae ACLU asserts that interviews with child sex abuse victims are so fraught with "pitfalls and hazards," ACLU Br. p.23, that "additional protections are required to make the right to confrontation meaningful." ACLU Br. p.21. The necessary protection urged by the ACLU is a prophylactic rule that all interviews with such victims be recorded if hearsay stemming from such interviews is to be admissible at trial.[6] The ACLU proposes that the absence of a videotape should constitute an absolute bar to admissibility of the child's out-of-court statement "notwithstanding the existence of a residual hearsay exception, without the necessity of a case-by-case

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[6] The nature of the "recording" required by the proposed prophylactic rule is not clear. On the one hand, a rule of exclusion is triggered whenever prosecutorial authorities interview a child and "do not *audio or videotape* the interview." ACLU Br. p.27 (emphasis added). On the other hand, a footnote on the same page of the ACLU brief endorses "the use of *videotape* in this context as a prophylactic rule." ACLU Br. p.27, n.37.

analysis under the Confrontation Clause." ACLU Br. p. 21.[7]

In this way, the argument goes, the rights of the accused will be preserved because the defendant will have a more effective way of challenging the hearsay statement. At the same time, "undesirable prosecutorial behavior" will be reduced because "prosecutors will not be able to badger children into making highly questionable statements." ACLU Br. p.28.[8]

Much of the support for the ACLU's proposed *per se* rule of exclusion is premised upon *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967). In *Wade-Gilbert* each accused was faced with a pretrial lineup after he had been arrested, was in custody and had had counsel appointed. This Court held that conducting a lineup in the absence of counsel resulted in the defendant's Sixth Amendment right to counsel being impinged upon in a "critical stage" of the criminal proceeding. The Court mandated that when a lineup has been conducted without counsel an in-court identification is admissible only if it can be shown that an independent basis exists for the identification. The ACLU argues that

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[7] The ACLU makes no differentiation between types of cases, ages of victims, or qualifications of persons conducting the interview, except to lump all interviewers into one category as "prosecutorial authorities." ACLU Br. p.27.

[8] The ACLU marshals support for its theory of such misconduct by supplying the court with references to three newspaper articles from a four-and-one-half year period dealing with allegedly false accusations. Hence, false accusations are "not uncommon." ACLU Br. p.23.

the *Wade-Gilbert* rule is needed in situations "when the risk of erroneous convictions is high" because "a realistic assessment of the propensities of the police" to engage in "improper suggestion" frequently leads to "mistakes in identification" and deprives the accused of any meaningful examination of the witness at trial. ACLU Br. pp.20-21. The ACLU submits that the eyewitness identification at a pre-trial lineup is "not unlike" the "defendant's situation when he is accused of sexual abuse in an out-of-court statement by a young child. . . ." ACLU Br. p.21.

The State of Idaho submits that the analogy drawn by the ACLU is flawed. Moreover, the application of the proposed rule is impractical and unworkable.

This Court has recognized that there is a fundamental difference between evidence gathering and the interviewing of witnesses on the one hand and placing the defendant in a confrontational position with the state on the other.

> None of the classical analyses . . . suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when, as here, the defendant is under arrest; counsel is rather to be provided to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proffered.

United States v. Ash, 413 U.S. 300, 316-317 (1973), quoting *United States v. Bennett*, 409 F.2d 888, 899-900 (2nd Cir. 1969).

The *Ash* Court stated that the *Wade-Gilbert* rule would not be expanded to non-confrontational settings (in that

case, identification of a defendant through the use of a photo-lineup) and that "[i]f accurate reconstruction is possible, the risks inherent in any confrontation still remain, but the opportunity to cure defects at trial causes the confrontation to cease to be 'critical.' " 413 U.S. at 316.

Because the interview of a child witness does not contain any element of confrontation between any representative of the state and the defendant, *Wade-Gilbert* is not helpful.[9]

Nevertheless, the ACLU's argument goes, *Wade-Gilbert* dealt with a situation which made it very difficult for an accused to defend against an identification which could be false but which the defendant had no way of guarding against or responding to. Hence, special safeguards were required. Because of the possibility of false accusation or confabulation, similar safeguards should be grafted onto child interviews.

The State of Idaho submits that this is precisely why the *Ash* Court stressed that scientific precision is not the test for requiring the presence of counsel and that the safeguard against abuses begins with the ethical responsibility of the prosecutor and continues with the

[9] It should be further noted that not only did the younger daughter's interview with Dr. Jambura not involve an element of confrontation with Wright, the girl did not implicate Laura Lee Wright in any criminal activity. Only Bobby Giles was the subject of Dr. Jambura's allegedly improper questioning and the girl's spontaneous identification ("Daddy does this with me, but he does it a lot more with my sister than with me." J.A. 123).

capability of the court to review the matter under due process standards. 413 U.S. at 320.[10]

The demand for indicia of reliability of *Ohio v. Roberts* is exactly the type of review process contemplated. It is the duty of the court to look at all of the circumstances in order to determine whether the child's statements will go to the jury. If insufficient corroborating factors exist, the court will not allow the use of the child's hearsay. This is similar to the role of the trial court as described in *Wade*. There, the Court set forth the duty of the trial court to determine whether or not to allow a witness to testify as to identification from a source independent from an uncounseled lineup. The application by the court of the analysis required by *Wong Sun v. United States*, 371 U.S. 471 (1963), is simply a recognition that a judge will have to look at indicia of reliability in making an evidentiary determination.

The inflexibility of the *per se* rule in *Wade-Gilbert* was identified by Justice Rehnquist in his concurring opinion in *Moore v. Illinois*, 434 U.S. 220 (1977):

> I believe the time will come when the Court will have to re-evaluate and reconsider the *Wade-Gilbert* rule. . . . The rule was established to ensure the accuracy and reliability of pretrial identifications and the Court will have to decide

[10] The ACLU also fails to recognize that professionals such as pediatricians and psychologists who interview children also have high standards to adhere to. To suggest that such interviewers would abandon their duty to a child or would function merely as a "prosecutorial agent," ACLU Br. p.21, or "an investigator for the police," ACLU Br. p.4, is overreaching in the extreme.

> whether a *per se* exclusionary rule should still apply or whether *Wade-Gilbert* violations, like other questions involving the reliability of pretrial identification, would be judged under the totality of the circumstances.

434 U.S. at 233.

Finally, the *per se* rule submitted by the ACLU is not reasonable. The experience of an urban attorney may well be that "[i]n 1990, it is highly unlikely that recording equipment will not be available" whenever a child sexual abuse victim is interviewed by the police or by someone who is arguably an "agent" of the police. ACLU Br. p.27, n.37. The reality, outside the major metropolitan corridors, is more accurately portrayed by Chief Justice Bakes in his dissent in *Wright:*

> Family doctors do not normally film their examinations of young patients; most probably do not have video cameras in their examining rooms. Furthermore, many rural communities do not have the financial means to set up extensive videotape facilities to aid in the preparation of criminal cases. Until today, there were no such requirements under either state or federal law.

775 P.2d at 1232.

It is also highly questionable that the problem of "confabulation" will be solved by recordation. In most cases, the child will be interviewed by a professional seeking to determine what happened to the child. It is unlikely that the person interviewing the child will have a reason to lead a child to confabulate. If there is confabulation, it will most likely have occurred before the interview, and a recordation, by respondent's own admission,

would not show that fact.[11] The *per se* rule also allows for no good faith exception. Considering that recording devices do not always work, and that audio and videotapes are relatively easy to ruin, this rule would mean the release of defendants on highly questionable grounds without a corresponding societal benefit.

B. The Out-of-court Statements of a Child Sexual Abuse Victim Are Not Analogous to Hypnotically Refreshed Testimony.

Amicus curiae ACLU finally asserts that the unrecorded interview statements of a child sexual abuse victim present "an analogous situation," ACLU Br. p.26, to that of a witness whose testimony has been hypnotically enhanced. According to the ACLU, the child victim, like the hypnotized individual, "becomes subject to suggestion, is likely to confabulate, and experiences artificially increased confidence in both true and false memories following hypnosis." *Rock v. Arkansas*, 483 U.S. 44, 62 (1987) (Rehnquist, C.J., dissenting).

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[11] It must be borne in mind that the younger daughter was never placed into a position where she could have confabulated the statements to Dr. Jambura. She had no contact with Louis Wright, his girlfriend Cynthia Goodman, or her five-and-one-half-year-old half-sister in the day between removal from her home and the interview with Dr. Jambura. Nor does it appear that anyone she contacted had a motive to attempt such a tactic. The suggestions of an ugly custody dispute between Louis and Laura Lee Wright have no application to the younger daughter. Her natural parents were Wright and Giles, who had sole custody of her at all times pertinent to this case.

This Court's opinion in *Rock* is not only distinguishable from the present case; it actually stands for the opposite of the position advocated here by the ACLU.

First, the *Rock* case did not implicate the defendant's right under the Confrontation Clause of the Sixth Amendment to confront an accuser. Instead, it involved the right of the defendant to testify on her own behalf. The Court located that right in the Fourteenth Amendment's deprivation of liberty clause, the Sixth Amendment's compulsory process clause, and the Fifth Amendment's privilege against self-incrimination.

More importantly, the *Rock* case provides no support for the *per se* exclusionary rule advocated by the ACLU in this case. On the contrary, *Rock* overturned precisely such a rule enacted by the State of Arkansas largely because such a rule:

> does not allow a trial court to consider whether posthypnosis testimony may be admissible in a particular case; it is a per se rule prohibiting the admission at trial of any defendant's hypnotically refreshed testimony on the ground that such testimony is always unreliable.

Id. at 56 (footnote omitted).

The majority found the *per se* rule unconstitutional even though it recognized that "the use of hypnosis in criminal investigations . . . is controversial, and the current medical and legal view of its appropriate role is unsettled." *Id.* at 59.[12]

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[12] The dissenters in *Rock* would have deferred to and sustained the Arkansas *per se* exclusionary rule as a reasonable

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The Court held that the cure was not to bar all hypnotically enhanced testimony, but rather to rely upon the "traditional means of assessing accuracy of testimony." *Rock*, 483 U.S. at 61. In particular, the Court pointed to the availability of "corroborating evidence" (a defective gun in the *Rock* case) to verify the accuracy of the information recalled as the result of hypnosis. *Id.* This approach of relying on the trial court to test the admissibility of the out-of-court interview statements of a child sexual abuse victim by looking to the totality of the circumstances and all corroborating evidence surrounding the statement and the events is precisely the approach suggested by the petitioner in this case. It is the only

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response to the fact that the scientific understanding of hypnotically refreshed testimony is still in its infancy. *Id.* at 65. There is, of course, no question that the Idaho Supreme Court has the right to impose on its own lower courts a prophylactic rule requiring audio or videotaping of out-of-court statements of child sexual abuse victims. The dissenters in *Giles*, in fact, endorsed Model Rule of Evidence 807, which contains precisely such a requirement. *See Giles*, 115 Idaho at 995, 772 P.2d at 202. The question here is whether the *Giles* dissenters, when they became the *Wright* majority, could constitutionalize this provision of Model Rule 807 as the minimum required by the Confrontation Clause of the Sixth Amendment to the United States Constitution.

approach that comports with the mandates of *Ohio v. Roberts*.

Respectfully submitted,

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

THE STATE OF IDAHO, Plaintiff, -vs- PAMELA RAE SANTIAGO, Defendant.	**ORDER ON DEFENDANT's AMENDED MOTION TO SUPPRESS EVIDENCE** Case No. CR-89-09065 (Filed March 8, 1990)

On January 30, 1990, the defendant, **Pamela Rae Santiago**, filed an **Amended Motion to Suppress**. In said motion, the defendant requested the suppression of all hearsay statements of the victim, Desiree Wight, regarding the alleged sexual abuse by the defendant. The motion is based upon constitutional grounds.

On March 5 and 6, 1990, this Court heard testimony and argument regarding the defendant's motion. This Court also reviewed the briefs and affidavits filed by the parties regarding such motion.

Carol Griffiths' Video Tape

This Court was asked to suppress the video taped interview by Carol Griffiths of Desiree Wight, the alleged victim. The video tape was admitted for the purpose of the motion as State's Exhibit 2. This Court finds that the video tape of the victim made by Carol Griffiths, an

investigator for the Boise Police Department, is admissible. Said tape is admissible since it meets the requirements set forth in *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989), concerning the video taping of an interview with a child. This Court further finds that during that interview, Desiree Wight was not subjected to leading questions or coaching, but answered questions fairly put to her. For these reasons the motion to suppress State's Exhibit 2 is **DENIED**.

* * *

The victim's statements to Jan Hindman.

At the request of the prosecuting attorney, Desiree Wight was interviewed by Jan Hindman, a mental health therapist specializing in sexual abuse. Jan Hindman interviewed Desiree Wight on four different occasions. No video or audio recording was made of the interviews. This Court finds that any hearsay statements made by Desiree Wight during such interviews is inadmissible since they were not audio taped or video taped as required by *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989). Based upon the authority of *State v. Wright*, this Court finds that Hindman's proposed testimony lacks sufficient guarantees of trustworthiness needed to overcome the defendant's right to confront the defendant's accuser. Therefore, the defendant's motion to suppress the statements made by the victim to Jan Hindman is **GRANTED.**

Dated this 8th day of March, 1990.

Gerald L. Weston
Gerald L. Weston
District Judge

In the companion case of *State v. Steve G. Santiago*, Case No. CR-89-09066, the district court entered an order identical to the order issued in *State v. Pamela Rae Santiago*, Case No. CR-89-09065.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

THE STATE OF IDAHO, Plaintiff, vs. GREGORY OLIVEIRA, Defendant.	))))))	Case No. 6850 MEMORANDUM DECISION

Defendant's Motion *in Limine. Granted.*

K. Ellen Baxter, Prosecuting Attorney for Twin Falls County, for plaintiff.

Michael Wood, Public Defender for Twin Falls County, for defendant.

I. FACTS

On January 30, 1989, defendant, Gregory Oliveira, was charged with one count of Lewd and Lascivious Conduct with his daughter, Tina Oliveira. After a preliminary hearing, the defendant was bound over to District Court. On June 16, 1989, the State filed a notice of intent to produce hearsay testimony, pursuant to I.R.E. 803(24) and I.C. Sec. 19-3024. The defendant then filed a motion *in limine* seeking to exclude the hearsay statements. A four day hearing was held on the the [sic] motion which included extensive testimony and evidence.

During the hearing, Kathy Oliveira, Tina's mother, testified that she left her three year old daughter in the care of her husband, the defendant, for nearly one and one half hours on the afternoon of January 20, 1989.

Kathy returned home from her shopping trip sometime between 5:00 p.m. and 5:30 p.m. Upon returning, she noticed nothing unusual about Tina's behavior. Tina was sitting on the floor watching television. Kathy then cooked dinner. After an argument with Kathy over burning the pizza, the defendant ate his dinner and retired to the couch where he fell asleep. Meanwhile, Kathy watched television while Tina played with her cat and toy phone.

At approximately 9:00 p.m., Tina approached Kathy with her hand on her crotch at which time essentially the following conversation occurred:

Tina: "I hurt."

Kathy: "Where do you hurt?"

Tina: "Right here, momma." (and rubbed her vaginal area with her hand.)

Kathy: "Why do you hurt there?"

Tina: "Daddy licked me."

Kathy: "No, honey, you mean daddy tickled you."

Tina: "No, momma, daddy licked me." (and made a licking motion with her mouth and tongue) "And I licked him."

Kathy then pulled Tina's pants down to investigate but did not see anything unusual. Tina continued to complain that her crotch itched and was sore. Kathy then attempted to call her aunt, Linda Helmer, about the incident, but there was no answer.

After the defendant awoke, Kathy confronted him about Tina's complaint. Defendant denied the accusations. Kathy made a second attempt to contact Helmer and was successful. Kathy, Tina and the defendant then went to Helmer's home. Kathy asked Helmer to speak with Tina. Helmer took Tina into the bedroom where essentially the following conversation occurred:

Linda: (Gidget, a pet, was on the bed. Tina asked about Cuddles, another pet, and I told her Cuddles was downstairs.)

Linda: "Did your mom go to the store?"

Tina: "For pizza and pepsi."

Linda: "Who watched you?"

Tina: "Daddy."

Linda: "What did you guys do?"

Tina: "He licked me."

Linda: "You mean he spanked you?"

Tina: "No, he licked me." (She made the motion with her tongue and put her hand between her legs.)

After leaving the bedroom, Helmer and Tina went to the kitchen with Kathy and the defendant. Helmer's husband, Gordon, was seated in the kitchen at the time. Kathy then took Tina to the sink where Tina spontaneously said, "Daddy licked me down there." Tina then touched her crotch. At this point, Helmer said, "If you did this, you better get some help."

pp. 1-3.

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On January 29, 1989, Kathy took Tina to see a pediatrician, Dr. Barton Adrian. At his office, Dr. Adrian, who specializes in interviewing and treating abused children, conducted an untaped interview of Tina with Kathy present. Dr. Adrian asked various preliminary questions gauged to assess Tina's ability to communicate. After doing this, Tina was shown anatomical figures. One of the figures was that of an unclothed female. As Dr. Adrian pointed to an eye on the drawing, Tina pointed to her eye. This procedure continued until Dr. Adrian pointed to the vulva. Tina then said, "Daddy licked me." When asked what that means, Tina stuck her tongue out. Dr. Adrian then showed Tina an anatomical picture of a male. As Dr. Adrian pointed to the penis, Tina said, "I licked him."

p. 5.

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B. Tina's Statement to her Aunt, Linda Helmer, made on January 20, 1989 at the Helmer home.

The State first seeks to introduce Tina's January 20, 1989 statements made to her aunt, Linda Helmer, under the catch-all exception of I.R.E. 803(24). The Idaho Supreme Court in *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988) held that:

> To be admissible under I.R.E. 803(24), the court must determine that (A) the statement has circumstantial guarantees of trustworthiness equivalent to those in Rules 803(1) to 803(23),

> (B) the statement is offered as evidence of a material fact, (C) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (D) the general purpose of the rules of evidence, and the interests of justice, will best be served by admission of the statement into evidence. Further, (E) a statement may not be admitted under I.R.E. 804(24) unless its proponent gives the adverse party adequate notice and information regarding use of the statement.

Id. at 697.

In interpreting 803(24), the court in *State v. Wright*, 89 I.S.C.R. 831 (June 13, 1989) found that statements made to a doctor in a sex abuse case did not meet this trustworthiness standard. The court stated:

> The Wright girl's declarations are not trustworthy because of Dr. Jambura's interview technique: the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and, blatantly leading questions were used in the interrogation. Further, the statements lack trustworthiness because this interrogation was performed by someone with a preconceived idea of what the child should be disclosing. Because of the combined effect of her tender years and the suggestive, inadequately reviewable interview technique applied by Dr. Jambura, we conclude that Dr. Jambura's testimony regarding the younger Wright girl's declarations lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause.

Id. at 835.

Here, Tina's statements to her Aunt, Linda Helmer, were derived from an interview. Tina was taken by her mother to the Helmer residence for the purpose of having Helmer question Tina about her statements concerning the alleged sexual contact with her father, the defendant. Kathy Oliveira asked Helmer to interview Tina about the incident. Because these statements were made in the context of an interview, the requirements of *Wright* apply.

Based on the Supreme Court's holding in *Wright*, statements made by a child witness during an interview and sought to be introduced under Rule 803(24), in addition to the requirements under *Hester*, can only be introduced if, 1) the interview is recorded on videotape, 2) that blatantly leading questions are not used, and 3) that the interrogation was not performed by someone with preconceived ideas or biases.[1]

The interview with Helmer was not videotaped and this court, therefore, feels constrained under *Wright* and Justice Huntley's concurrence in *Giles* to rule that Tina's statements to her Aunt, Linda Helmer, made on January 20, 1989, at the Helmer home are inadmissible hearsay and do not qualify for admission under I.R.E. 803(24).

pp. 11-13.

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[1] *See also*, the concurring opinion of Justice Huntley in *State v. Giles*, 89 I.S.C.R. 373 (1989) where he states,

> *At a minimum, the sessions* (interviews of child witnesses in child abuse cases) *should be videotaped* and the examiner should not be permitted to use leading, suggestive and "closed-ended" questions.

Id. at 378 (emphasis added).

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6. Tina's statements to Dr. Adrian during the interview on January 27, 1989.

The State seeks to introduce Tina's statements to Dr. Adrian as statements made for the purpose of medical diagnosis pursuant to I.R.E. 803(4). This hearsay exception reads, "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the course thereof insofar as reasonably pertinent to diagnosis or treatment." *Id.* In the present case, Tina's statements were not made for the purpose of medical diagnosis or treatment. Rather, Tina's statements to Dr. Adrian were made solely as part of the State's criminal investigation and in anticipation of litigation.

p. 20.

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The State also intimates that the statements made to Dr. Adrian could be admitted under 803(24).[1] Under this exception, a video taped interview is required. *State v. Wright, supra.* Dr. Adrian's interview was not videotaped. Therefore, it cannot be admitted under Rule 803(24).

p. 23.

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[1] *See, e.g.*, discussion of I.R.E. 803(24) under heading B, page [sic] 11-13 [Appendix pages 7-9].